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The Culture War: A Look at the Cultural Exception Principle in International Trade Law

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Abstract

In studying the concepts of trade and culture in the context of international law, it appears at first that the two are at odds: the cultural exception approach vouches for protectionism and national sovereignty while trade defends liberalization and globalization. However, within this distinction lies a misconception. Culture doesn't necessarily reject trade. The word "exception" does. This study presents and analyzes the notion of cultural exception within the framework of international trade law, specifically examining the legal protections and recourses offered by the World Trade Organization ("WTO") and alternative treaties and agreements (e.g. Canada-U.S. Free Trade Agreement ("CUSFTA"), United Nations Educational, Scientific, and Cultural Organization ("UNESCO")). While this study shows that cultural exception proponents have a hard time making a case on the international legal stage, the challenge lies in how culture is perceived and understood from a legal standpoint. This study delves into a number of WTO cases to assess to what extent culture plays a role in furthering trade liberalization, taking into account the current international debate regarding the Transatlantic Trade and Investment Partnership ("TTIP") and the Trans-Pacific Partnership ("TPP").

KEYWORDS: GATT, Cultural Exception, UNESCO Convention, TTIP, TPP

ESSAY

THE CULTURE WAR: A LOOK AT THE CULTURAL EXCEPTION PRINCIPLE IN INTERNATIONAL TRADE LAW

Liz Schéré

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In studying the concepts of trade and culture in the context of international law, it appears at first that the two are at odds: the cultural exception approach vouches for protectionism and national sovereignty while trade defends liberalization and globalization. However, within this distinction lies a misconception. Culture doesn't necessarily reject trade. The word "exception" does. This study presents and analyzes the notion of cultural exception within the framework of international trade law, specifically examining the legal protections and recourses offered by the World Trade Organization ("WTO") and alternative treaties and agreements (e.g. Canada-U.S. Free Trade Agreement ("CUSFTA"), United Nations Educational, Scientific, and Cultural Organization ("UNESCO")). While this study shows that cultural exception proponents have a hard time making a case on the international legal stage, the challenge lies in how culture is perceived and understood from a legal standpoint. This study delves into a number of WTO cases to assess to what extent culture plays a role in furthering trade liberalization, taking into account the current international debate regarding the Transatlantic Trade and Investment Partnership ("TTIP") and the Trans-Pacific Partnership ("TPP").

ABSTRACT.....	561
INTRODUCTION	562
I. THE SOURCE: THE LEGAL CLASSIFICATION AND QUALIFICATION OF CULTURE WITHIN THE WTO FRAMEWORK	563

A. The Concept of Culture within the GATT	563
B. The Concept of Culture within the GATS	565
II. THE CLAIM: THE CULTURAL EXCEPTION'S SCOPE WITHIN THE WTO'S LEGAL OBLIGATIONS.....	567
A. The Cultural Exception and the Non-Discrimination Principle	567
B. The Cultural Exception, Safeguard Clause and General Exceptions	570
1. The Safeguard Clause.....	570
2. The General Exceptions	571
C. The Assessment of the Cultural Exception within the WTO.....	573
III. THE RESULT: THE CULTURAL EXCEPTION AND ALTERNATIVE APPROACHES	574
A. The UNESCO Convention	574
1. UNESCO Convention's Article 20	575
2. The role of non-WTO law within the WTO dispute settlement system	576
B. Examples of different approaches to protecting the cultural exception	578
1. The European Union	578
2. Canada and the United States.....	580
CONCLUSION.....	581

INTRODUCTION

When the subject of culture is presented at the negotiation table in the context of international trade law, the phrase “agree to disagree” comes to mind. There is a palpable cleavage between States regarding trade liberalization and culture. The United States sees positively the inclusion of culture as a key component of international trade. Cultural goods and services are viewed as profitable utilitarian commodities that should be protected as well as disseminated worldwide. Others, like Canada and the European Union, consider trade liberalization to be the Achilles’ heel of their respective cultures. As trade liberalization proceeds, many countries have expressed their desire to protect, *inter alia*, national identity, beliefs,

and values through a range of policies on culture.¹ Interest in the matter resurfaced when France insisted that “*l’exception culturelle*” be completely off the negotiation table of the proposed TTIP between the United States and the European Union.² The French got their way and the audiovisual sector was excluded from the negotiation agenda with the United States.³ France’s protectionism over its audiovisual industry raises an interesting question: to what extent does trade liberalization affect the cultural exception? Trade liberalization, from a legal standpoint, appears to be in dissonance with the protection of cultural sovereignty. However, the issue stems from the continuing difficulty of qualifying culture within an international legal framework.

The following study will first examine how culture is legally classified and interpreted within the framework of the WTO. Once the nature and scope of culture have been identified, the concept of cultural exception will be analyzed by taking a look at the different measures through which the WTO already supports or inhibits member states from promoting or protecting their cultural goods and services. The final part of this study will look more closely at additional sources of international law and other types of international agreements in order to assess whether the cultural exception fares a better chance of protection under these alternative legal frameworks.

I. THE SOURCE: THE LEGAL CLASSIFICATION AND QUALIFICATION OF CULTURE WITHIN THE WTO FRAMEWORK

A. The Concept of Culture within the GATT

In order to understand why a WTO member state wishes to exclude a certain cultural sector from its bilateral or multilateral agreements, it is important to first examine how culture fits into the WTO framework. It is essential to begin this study with the following

1. See Mary E. Footer & Christoph Beat Graber, *Trade Liberalization and Cultural Policy*, 3 J. INT’L ECON. L. 115, 115-16 (2000).

2. See Peter Spiegel, *France, films & foreign trade: the leaked mandate*, FIN. TIMES: BRUSSELS BLOG (June 10, 2013), <http://blogs.ft.com/brusselsblog/2013/06/10/france-films-foreign-trade-the-leaked-mandate/>.

3. See News Wires, *EU reaches deal on French ‘cultural exception’*, FRANCE24 (June 15, 2013), <http://www.france24.com/en/20130615-eu-deal-french-cultural-exception-usa-trade>.

statement: there is no explicit, conspicuous mention of the “cultural exception” in the different WTO agreements. There is no mention of the word “culture” in either the General Agreement on Tariffs and Trade (“GATT”) or in the General Agreement on Trade and Services (“GATS”). Culture is included in both agreements as two different forms: goods and services.⁴ GATT applies to all goods, including cultural goods (e.g. films, CDs, books, paintings). The only affirmative and defined treatment for these goods is in Article IV, which provides certain exceptions to national treatment (Article III) and most-favored nation (“MFN”) (Article I) for film screening quotas.⁵ GATT 1947 shows that the original drafters were aware of the need for treating cultural products differently. The exception was a response to the huge number of US films flooding the European market as a result of the disruption of trade caused by World War II.⁶

The only other reference to culture in the GATT is in Article XX on “General Exceptions.” It allows members to take certain measures to protect “public morals” (Article XX(a)) and “national treasures of artistic, historical, or archaeological value” (Article XX (f)). The United States has suggested that GATT Article XX is one way in which WTO trade rules “take into account the special cultural qualities of the audiovisual sector.”⁷ However, unlike agriculture or textiles and clothing, cultural goods, apart from Article IV, do not have their own separate legal classifications and rules to follow under the WTO umbrella.⁸ The GATT doesn’t define “artistic value” or “public morals,” thus leaving the job of interpretation to the WTO Panel and the Appellate Body in the dispute settlement system. Some have argued that had the contracting parties intended to place an

4. *Services Sectoral Classification List* (July 10, 1991), GATT BISD, MTN.GNS/W/120. That being said, neither does the GATT give a definition of a “good” nor does the GATS give a definition of a “service.” Instead, the GATT Secretariat issued an indicative list of service activities or sectors that most WTO members have used as a template when making.

5. See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT] (“If any contracting party establishes or maintains internal quantitative regulations relating to exposed cinematographic films, such regulations shall take the form of screen quotas.”).

6. See Chi Carmody, *When “Cultural Identity Was Not At Issue”: Thinking About Canada – Certain Measures Concerning Periodicals*, 30 L. & POL’Y INT’L BUS. 231, 255 (1999).

7. Communication from the United States, *Audiovisual and Related Services*, ¶ 8, WTO Doc. S/CSS/W/21 (Dec. 18, 2000).

8. See the different sections allocated to these industries under GATT 1994.

explicit cultural exception in the text of the GATT, Article XX would have been the logical place.⁹

Considering that the answer is not explicitly mentioned in the text, legal interpretation would suggest that the intent of the drafters, or *travaux préparatoires*, should be examined. During the Uruguay Round negotiations (1986-93), the trade and culture debate between the United States and the European Communities (and Canada) gave way to an outright conflict centered on “cultural identity” and trade in television programs and film, to the extent that the term “culture” became synonymous with the word “audiovisual.”¹⁰ The latter consideration, as well as France’s position on excluding the audiovisual sector from TTIP negotiations, implies that the audiovisual sector is the cultural product that generates the most concern for the negotiating partners. For the purpose of this study, the audiovisual sector will be the adopted frame of reference for culture.¹¹

B. The Concept of Culture within the GATS

Culture is legally classified under two different regimes within the WTO. As noted, the GATT regulates cultural goods. Goods, however, are usually created through a service (e.g. writing a book or painting a picture). The GATS covers the “services” component of cultural goods. Services are invisible products without physical properties.¹² Cultural services are, for example, “Motion Picture and Video Tape Production and Distribution Services” or “Motion Picture Projection Services.”¹³ The applicability of GATT to a scenario involving the treatment of goods does not exclude the applicability of GATS if the pertinent measures affect the services provided with regard to that good.¹⁴ For example, the cinematographic film,

9. See Frederick Scott Galt, *The Life, Death, and Rebirth of the “Cultural Exception” in the Multilateral Trading System: An Evolutionary Analysis of Cultural Protection and Intervention in the Face of American Pop Culture’s Hegemony*, 3 WASH. U. GLOBAL STUD. L. REV. 909 (2004).

10. Footer & Garber, *supra* note 1, at 119.

11. “Frame of reference”: Audiovisuals will be the main, but not exclusive, focus.

12. See Michael Hahn, *The Convention on Cultural Diversity and International Economic Law*, 2 ASIAN J. WTO & INT’L HEALTH L. & POL’Y 229, 240 (2007) (quoting Werner Zdouc, *Legal Problems arising under the General Agreement on Trade in Services – Comparative Analysis of the GATS and GATT* (Doctoral Thesis, Universitat St. Gallen) (2002)).

13. *Id.*

14. See GATT, *supra* note 5, annex 1B, art. I, 1 [hereinafter GATS] (stating broadly that it applies to any measure by any WTO member “affecting” trade in services. In *EC-Bananas*,

regulated in GATT Article IV, would be subject to the GATS if it were to be projected onto screens from a digital central distribution point.¹⁵ That being said, the distinction between goods and services was not an accident. A fact pattern may oscillate between goods and services but the Dispute Settlement Understanding (“DSU”) prohibits the overlap of one agreement’s treatments (GATT) to another (GATS) and vice-versa.¹⁶

The GATS has its own version of Article XX: GATS Article XIV. However, Article XIV only mentions “public morals” as a general exception. There is no reference to “artistic value.” The exclusion of “arts” from Article XIV would suggest that the legal concept of a cultural exception would be difficult to defend under the GATS. In addition, similar to GATT Article XX, GATS Article XIV’s interpretation is left to the Panel and the Appellate Body. Therefore, judicial interpretation, although only “technically” binding to the specific underlying case in issue, could potentially lead to a degree of legal uncertainty with regard to the use of a cultural exception to trade in goods or services.¹⁷

the Appellate Body found that the GATT and the GATS are not mutually exclusive, so the same measure can be subject to both GATT and GATS); Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, ¶221, WTO Doc. WT/DS2/AB/R (adopted Sept. 9, 1997).

15. Hahn, *supra* note 12, at 241 (quoting SASCHA WUNSCH-VINCENT, *THE WTO, THE INTERNET AND TRADE IN DIGITAL PRODUCTS – EC-US PERSPECTIVES* (2006)).

16. Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 3, ¶ 2, Apr. 15, 1994, 1869 U.N.T.S. 401 (“The members recognize that [the dispute settlement system] serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add or diminish the rights and obligations provided in the covered agreements.”).

17. ANDREW GUZMAN & JOOST PAUWELYN, *INTERNATIONAL TRADE LAW* 144 (2d ed. 2012) (“It is well settled that Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties. This, however, does not mean that subsequent panels are free to disregard the legal interpretations and the *ratio decidendi* contained in previous Appellate Body reports that have been adopted by the DSB. In *Japan-Alcoholic Beverages II*, the Appellate Body found that: adopted panel reports are an important part of the GATT acquis . . . They create legitimate expectations among WTO members.”).

II. THE CLAIM: THE CULTURAL EXCEPTION'S SCOPE WITHIN THE WTO'S LEGAL OBLIGATIONS

A. The Cultural Exception and the Non-Discrimination Principle

Member states are all subject to the general WTO principles of non-discrimination. The above-mentioned MFN provisions (GATT Article I and GATS Article II) and national treatment provisions (GATT Article III and GATS Article XVII) embody this non-discrimination. The MFN treatment has two major applications. First, whenever WTO members negotiate and grant trade concessions to other states, such concessions must automatically be extended to all other WTO members. Second, whenever a WTO member enacts legislation or certain trade-restrictive rules, it cannot discriminate between products from one WTO member and like products from another country.¹⁸ There are few exceptions to MFN; for example, GATT Article XXIV (1947) concerns the formation of a customs union or a free trade area. Thus, within the framework of the European Union, for example, film support policies such as import regulations could be justified.¹⁹

If the MFN treatment is about treating other states equally, national treatment is about treating foreign states and the domestic state equally. Under national treatment, imported products and “like domestic products” are to be treated equally, once the foreign goods have entered the market.²⁰ It is important to note that although the GATT heavily influences the GATS, the two agreements have some notable distinctions. Under the GATS, market access and national treatment are only granted if and to the extent Members have entered into pertinent specific commitments.²¹ Without the commitment, a Member is free to not grant foreign service providers the treatment enjoyed by their domestic counterparts. In addition, Members may opt to *not grant MFN treatment* provided they have listed such differential treatment in the GATS Annex on Article II Exemptions upon their acceding the WTO.²² Therefore, countries like France and Canada who wish to limit the effects of trade liberalization on their

18. *Id.* at 304.

19. Susanne Nikoltchev, *European Film Support within the WTO Framework*, in IRIS PLUS LEGAL OBSERVATIONS OF THE EUR. AUDIOVISUAL OBSERVATORY (2003).

20. GATT, *supra* note 5, art. 3, ¶2.

21. GATS, *supra* note 14, art. XX.

22. GATS, *supra* note 14, *Annex on Article II Exemptions*.

audio-visual sectors should look favorably to the flexible properties of the GATS. Conversely, the United States, who has a strong economic interest in disseminating its cultural products around the globe, has entered commitments with regard to popular cultural service products.²³ It should be noted that unlike the United States, very few Member States have entered into such commitments. By adhering to mechanisms promoting the application of non-discriminatory trade principles to all cultural products, the United States is directly opposing those in favor of the cultural exception.

The following cases will illustrate how the principle of cultural exception espoused by many Members is threatened by the United States' desire for less restrictive trade barriers. Trade liberalization is often directly confronted with a number of measures taken by States to protect their cultural industry. These measures come in the form of subsidies and/or tax incentives (e.g. Eurimages, a Council of Europe initiative, provides grants and loans for the co-production of European works); measures regulating broadcasting content; measures that control access to film markets (like screen quotas for cinemas in France, Spain, etc.); and finally, regulatory or licensing restrictions.²⁴ Means such as subsidies or other fiscal measures can be considered challengeable under the GATT. In the *Canada-Certain Measures Concerning Periodicals* case, the US-based company, Time Warner, began to circumvent Canadian custom tariffs prohibiting the importation of "split-run" magazines into Canada by electronically beaming the content of its Sports Illustrated magazine to printing facilities in Canada.²⁵ In response, the Canadian Parliament, in an effort to protect their own culture, passed a prohibitive eighty percent excise tax on all advertising revenue generated from split-run magazine sales across the country. The United States lodged a claim against Canada before the WTO's Dispute Settlement Body ("DSB"), arguing that since the excise tax did not apply to domestic magazines,

23. Footer & Graber, *supra* note 1, at 240. There are six sectors of audiovisual services, which mainly revolve around production and distribution.

24. Hahn, *supra* note 12, at 122-24.

25. A split run is a run (as of a newspaper or magazine) in which something (such as an illustration or wording of an advertisement) is changed part way through the run while remaining in the same position in the issue (as for testing the relative effectiveness of the two pieces of copy). *Definition of Split Run*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/split%20run> (last visited Dec. 1, 2016).

it violated the national treatment principle of GATT Article III.²⁶ Canada responded that Article III was inapplicable because the controversy was over advertising *services* rather than split-run *goods*, and that accordingly, GATS (and not GATT) should apply.²⁷ Canada's claim for GATS applicability was tactical: Canada had not made any national treatment commitments with respect to advertising services in the agreement.²⁸ Despite Canada's efforts in protecting its cultural services, the DSB ruled in favor of the United States, reasoning on the basis of "like products" under Article III of GATT. The Appellate Body found that "a periodical is a good comprised of two components: editorial content and advertising content. Both components can be viewed as having services attributes, but they combine to form a physical product – the periodical itself."²⁹

This case raises a number of issues: First, an understanding of what "like products" legally means is essentially uncertain since there is a discrepancy within the established case law regarding the question.³⁰ Second, when performing the "like products" analysis, the Appellate Body looked at the substitutability of the different editions of the magazines and whether they were in competition with each other in their relevant markets.³¹ The DSB therefore focused its analysis purely on economic considerations and did not engage in examining the value of promoting one's particular culture. The DSB's restraint can be explained however, as one author noted that this decision insists on a degree of specificity that culture could never provide.³² Third, this case shows that the WTO Panel and the Appellate Body focus on the *measure* in question and its subsequent effect on trade in goods and services, with physical or material nature being a decisive criterion.³³

26. Panel Report, *Canada-Certain Measures Concerning Periodicals*, 17, WTO Doc. WT/DS31/R (Mar. 14, 1997).

27. *Id.* at 16.

28. *Id.* at 17.

29. Appellate Body Report, *Canada-Certain Measures Concerning Periodicals*, 17, WTO Doc. WT/DS31/AB/R (1997).

30. See *WTO Dispute Settlement: One Page Case Summaries 1995-2011*, WTO (2012), https://www.wto.org/english/res_e/booksp_e/dispu_summary95_11_e.pdf regarding EC-Asbestos, Japan-Alcoholic Beverages, EC-Bananas, and Dominican Republic-Cigarettes for an understanding of the various Appellate Body interpretations of "like products."

31. *Supra* note 29, at 29.

32. Carmody, *supra* note 6, at 295-96.

33. GUZMAN & PAUWELYN, *supra* note 17, at 625.

In *China—Measures Affecting Trade Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, in response to China’s argument that films for theatrical release are services and not goods, the Appellate Body reasoned that they “do not see the clear distinction drawn by China between ‘content’ and ‘goods.’ Neither do [they] consider that content and goods, and the regulation thereof, are mutually exclusive. Content can be embodied in a physical carrier, and the content and carrier together can form a good.”³⁴ If the DSB is more inclined to give weight to the “good” component than the “service” component, proponents of the cultural exception may have a reason to worry, since exceptions to non-discrimination measures are stronger under the GATS than under the GATT, notwithstanding the “General Exception” provisions and the Article IV screen quota exception to Article III.

B. The Cultural Exception, Safeguard Clause and General Exceptions

Based on the Appellate Body’s reasoning in both the *Canada-Periodicals* case and *China-Audiovisuals* case, it appears that the United States is tactically chipping away at the barriers for promoting and protecting domestic content. As a legalistic and powerful country, the United States has the means and the time to assert its dominance on the international trade market. Considering the GATS provisions for differential treatment have not persuaded the DSB, are there any other mechanisms within the WTO framework that would allow for proponents of the cultural exclusion to breathe a sigh of relief?

1. The Safeguard Clause

The Safeguard clause (GATT Article XIX) allows for quantitative restrictions in the case of a threat of serious injury to domestic producers. Article XIX states:

If, as a result of unforeseen developments . . . any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such

34. Appellate Body Report, *China-Measures Affecting Trade Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 195, WTO Doc. WT/DS363/AB/R (Dec. 21, 2009).

time as may be necessary...to remedy such injury, to suspend the obligation in whole or in part.³⁵

The Safeguard clause presents a number of issues for a cultural exception claim. First, the Safeguard clause presupposes that a surge of imports has occurred. In the context of strong trading partners like the European Union, how would a surge of US films onto the EU market be an “unforeseen development?” Second, the terms “like or directly competitive products” are likely to be subject to extensive judicial interpretation if cases like *EC-Asbestos* and *Japan-Alcoholic Beverages* are any indication.³⁶ Finally, as *Canada-Periodicals* has demonstrated, where there are separate claims for the cultural good on one hand and the cultural service on the other, it may be difficult to find evidence of what the actual “source” of the injury was. However, one could argue the case that an Article XIX claim could be possible if the Member State’s claim involved an infant-industry—that is, a new industry having difficulty competing with established competitors abroad—and the United States was flooding its market with US productions.³⁷

2. The General Exceptions

As noted in the first section, the WTO Agreement provides for “General Exceptions.” GATT Article XX and Article XIV both contain the same *chapeau*: “Subject to the requirements that such measures are not applied in a manner which would constitute a means of *arbitrary or unjustifiable discrimination* between countries where like conditions prevail . . . nothing in this Agreement shall be construed to prevent the adoption of enforcement by any Member of . . .” followed by the exhaustive list of measures. Article XX provides for the protection of both (a) “public morals” and (f) “national treasures of artistic value,” whereas Article XIV(a) provides for the protection of “public morals and public order.” The issue with “General Exceptions” is that the measures of cultural significance that they offer to protect are vague in their description. A definition of “national treasures of artistic values” cannot be found in the GATT. Moreover, as the following cases will show, the DSB is known to

35. GATT, *supra* note 5, art. 19, ¶1.

36. Those cases were analyzed by the DSB under Article III guidelines and not Article XIX. These cases are just an example of the meanders of judicial interpretation.

37. Nikoltchev, *supra* note 19, at 3.

give a restrictive interpretation of these exceptions. However, in *U.S.-Gambling*, the WTO panel did recognize the potential relevance of cultural concerns to this exception under Article XIV(a) of GATS. The Panel stated:

We are well aware that there may be sensitivities associated with the interpretation of the terms “public order” and “public morals” in the context of Article XIV. In the Panel’s view, the content of these concepts for members can vary in time and space, upon a range of factors, including “prevailing social, cultural, ethical, and religious values.”³⁸

In essence, the Panel considered “culture” both in a holistic way and in a way intrinsically linked to the Member State. Could “public morals” be extended to the audiovisual sector for a country like France, which considers cinema to be a dominant part of its national identity? The case has not been made but if it were, it is important to note that it must be considered in conjunction with the *chapeau*—that is, that the measures not constitute “arbitrary or unjustifiable discrimination.” In order to be successful under any general exception claim, the *chapeau* must be respected.

So far, no claim has been brought before the DSB with regard to Article XX(f)—“measure imposed for the protection of national treasures of artistic, historic, or archaeological value”—in the context of cultural products. However, a claim has been made under Article XX(a)—“public morals.” In *China-Audiovisuals*, only certain state-approved entities had the right to engage in the business of importing films into China. These entities entered into licensing or distribution agreements with foreign film producers or licensors, and after a content review, imported certain materials. The United States alleged that China was violating certain WTO obligations, namely market access provisions of GATS (Article XVI), national treatment provisions provided in GATS Article XVII and GATT Article III (4).³⁹ China raised an Article XX(a) defense, claiming, *inter alia*, that particular characteristics of cultural goods can have an impact on societal and individual morals. The Panel applied the interpretation of “public morals” developed by the panel in *US-Gambling*, thus

38. Panel Report, *United States – Measures Affecting the Cross Border Supply of Gambling and Betting Services*, ¶6.461, WTO Doc. WT/DS285/R (Nov. 10, 2004).

39. Request for the Establishment of a Panel by the United States, *China – Measures Affecting Trade Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc. WT/DS363/5 (Oct. 11, 2007).

implicitly stating that “public morals” under GATS and “public morals” under GATT are analogous. In their reasoning, the Panel, citing *US-Gambling*, expressed that “Members, in applying this and other similar social concepts, should be given some scope to define and apply for themselves the concepts of ‘public morals’ . . . in their respective territories, according to their own systems and scale of values.”⁴⁰ As far as the Panel is concerned, Members should be given complete deference in this matter. However, the Panel, followed by the Appellate Body, held China to a strict standard to justify the inclusion of Article XX(a) “public morals” defense as “necessary.” Both found that China failed to prove that the defense was “necessary.”⁴¹ Therefore, not only does the *chapeau* narrow the scope of Article XX, but also the terminology within the measure (in this case, the word “necessary”), makes it difficult for a member to defend their claim for “public morals.” By subdividing Article XX into a rigid two-tiered test, the DSB does not fully take into account the crux of the issue and moreover does not apply its own jurisprudence of “weighing and balancing” a number of distinct factors relating both to the measure sought to be justified as “necessary” and to possible alternative measures that may be reasonably available to the Member to achieve its desired objective.⁴² In sum, it appears that the DSB’s restrictive interpretation of the WTO exception rules do little to assuage the proponents of the cultural exception.

C. The Assessment of the Cultural Exception within the WTO

The case law presented above has demonstrated that the measures available to protectionist Members do not appear to convince the DSB that cultural goods and services are to be considered not only in terms of economic goals but non-economic goals. In the “weighing and balancing” of trade objectives versus non-economic goals, the DSB’s position is on the side of trade. This should not come as a surprise considering the objectives and missions of the WTO, but it could lead to more States preferring to form customs unions or free trade areas. However, some could argue that it

40. Panel Report, *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, 280, WTO Doc. WT/DS363/R, (Aug. 12, 2009) (citing Panel Report, *US-Gambling*, WTO Doc. WT/DS285/R (Nov. 10, 2004)).

41. *Supra* note 34.

42. *Id.* ¶ 239-42.

is inherently difficult to evaluate the concept of culture within any legal framework. Considering that there is no clear, legal outline to work from, the DSB may not necessarily be inclined to vote against the cultural exception, but that judicial interpretation can only go so far without explicitly defined rules.

As a result of the *Canada-Periodicals* case and the DSB's pure economic focus, many states have felt as if their cultural identities were not sufficiently protected under the umbrella of the WTO, and have decided to turn instead to the United Nations and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions in an attempt to reassert their sovereignty over cultural matters.⁴³ Furthermore, as a result of the growth of the US entertainment industry and the incredible speed at which technology is advancing, many States have made the resolution that cultural products are to be a moot point. In fact, in the Doha Round—the current trade negotiation round of the WTO—Canada, the European Union, and others refuse explicitly to enter into negotiations to liberalize trade in cultural products.

III. THE RESULT: THE CULTURAL EXCEPTION AND ALTERNATIVE APPROACHES

A. The UNESCO Convention

In the Forward of the Basic Texts of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, the Director-General of UNESCO, Irina Bokova, states the following: “the Convention is the first international instrument of its kind to recognize the very specific nature of cultural goods and services, having both an economic and cultural dimension.”⁴⁴ This Convention, according to its supporters, is the legal remedy to the WTO. It will serve the purpose of promoting cultural diversity (a more inclusive term than “cultural exception”) in both its non-economic goals as well as its economic goals. France and Canada spearheaded the Convention. They saw within the framework of UNESCO an

43. See Christopher M. Bruner, *Culture, Sovereignty, and Hollywood: UNESCO and the Future of Trade on Cultural Products*, 40 N.Y.U. INT'L L. & POL. 351, 356-57 (2007).

44. UNESCO, BASIC TEXTS OF THE 2005 CONVENTION ON THE PROTECTION AND PROMOTION OF THE DIVERSITY OF CULTURAL EXPRESSIONS (2013).

alternative dispute resolution process to the WTO for matters of culture and trade.

The UNESCO General Conference adopted the Convention on October 20, 2005 and many States were eager to affix their name to the treaty.⁴⁵ As of today, the United States still refuses to join. In fact, the United States is the main challenger to this Convention. It believes that this treaty would restrict exports of US audiovisual products, a sector where it is in an advantageous position. To countries like France and Canada, with a long history of subsidies and quotas to help their movie and television industries, this Convention is a stepping-stone to limiting the influx of US popular culture and protecting their cultural sovereignty. The debated issue is the impact of this Convention upon international law. Is the Convention a worthy alternative to the United States' long-arm reach into foreign cultural markets? In other words, can States turn to the Convention in attempt to bypass the WTO?

1. UNESCO Convention's Article 20

The UNESCO Convention is a binding treaty under international law. It imposes very few obligations on its parties.⁴⁶ Article 20, Section V of the Convention outlines its relationship to other treaties. Article 20(1) states:

. . . parties recognize that they shall perform in good faith their obligations under this Convention and all other treaties to which they are parties. Accordingly, *without subordinating this Convention* to any other treaty, (a) they shall foster mutual supportiveness between this Convention and the other treaties to which they are parties, and (b) when interpreting and applying the other treaties to which they are parties or when entering into other international obligations, Parties shall take into account the relevant provisions of this Convention.⁴⁷

Reading the latter language, it would seem that the Convention takes precedence over other international treaties since it explicitly states that the Convention will not be subordinated. However, Article 20(2)

45. Kevin Scully, *The Most Dangerous Game: U.S. Opposition to the Cultural Exception*, 36 BROOK. J. INT'L L. 1183, 1193 (2010-2011).

46. *Id.* (citing Mira Burri-Nenova, *Trade Versus Culture in the Digital Environment: An Old Conflict in Need of a New Definition*, 12 J. INT'L ECON. L. 17, 27 (2009)).

47. Convention on the Protection and Promotion of the Diversity of Cultural Expressions art. 20(1), Oct. 20, 2005, 2744 U.N.T.S. 181 [hereinafter CPPDCE].

comes in to weaken its intentions of establishing superior legal authority. Article 20(2) states: “Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties.”⁴⁸ Given the latter provision, some argue that the Convention has no “teeth” to enforce its principles.⁴⁹ In essence, Article 20(2) is stating that any other treaty to which the members are parties that came before the Convention, such as the WTO Agreements, should take legal precedence. This provision is in line with Article 26 of the Vienna Convention on the Law of Treaties, which requires that States avoid as much as possible to enter into contradictory obligations.⁵⁰ Since most Members of the Convention are also parties to the WTO, and most WTO case law appears to indicate that cultural products will be treated the same as other products, Article 20(2) essentially impedes any intention the Convention had to “reaffirm the sovereign rights of States to maintain, adopt, and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory.”⁵¹

2. The role of non-WTO law within the WTO dispute settlement system

Considering the seemingly contradictory provisions of Article 20(1) and Article 20(2), how is one to make sense of the legal leverage members may have under this Convention against cultural globalization? One may argue that the Convention is best understood as not altering existing obligations under international trade law but as enhancing the negotiating positions of States as they enter into future trade agreements. One may also wonder whether the Convention, as international law, has any effect *in* the WTO. The question of non-WTO law in WTO dispute settlement is controversial and there are diverging schools of thought. According to Professor Joel Trachtman, the WTO Panel’s normative duty is to apply WTO law exclusively: “It would be dangerous to confound the intent and expectations of

48. *Id.* art. 20(2).

49. Alan Riding, *Entr’acte: Next Lone U.S. Dissent: Cultural Diversity Pact*, N.Y. TIMES (Oct. 12, 2005), http://www.nytimes.com/2005/10/12/world/americas/entracte-next-lone-us-dissent-cultural-diversity-pact.html?_r=0.

50. Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.S.T. 331.

51. CPPDCE, *supra* note 47, art. 1(h).

states by forcing general international law into the WTO dispute settlement system.” In examining the WTO Agreements, Professor Trachtman points out that “Art. 3.2 specifies that the dispute settlement system serves to preserve the rights and obligations of members under the *covered agreements*.”⁵² On the other hand, Professor Joost Pauwelyn considers that non-WTO law is to be taken into account in the WTO dispute settlement system, since the WTO case law shows that the Panels and the Appellate Body have not limited themselves to WTO law. Professor Pauwelyn states that the DSB has “referred to general principles of law, customary international law, and even other, non-WTO treaties.”⁵³ Whether the DSB should or should not apply outside law to WTO legal proceedings is an interesting topic, but in the case of the Convention, what matters is what Professor Pauwelyn has mentioned regarding the past practice of the DSB. Both the Panel and the Appellate Body have looked outside the “four corners of WTO covered agreements.”⁵⁴

The Appellate Body has repeatedly stated that WTO law was not to be “read in clinical isolation from public international law.”⁵⁵ In *US-Shrimp*, the Appellate Body took into account that the term “exhaustible natural resources” must be read by a “treaty interpreter in the light of contemporary concerns of the community of nations.”⁵⁶ Furthermore, the Appellate Body turned to “modern international conventions and declarations” for instance, “the 1982 United Nations Convention on the Law of the Sea” to make its point that natural resources embrace both living and non-living resources.⁵⁷ Although this decision factually concerns the environment, one could argue that the legal interpretation process of the Appellate Body could be advantageous to a cultural exception defense. The potential defendant could invoke its rights arising under the UNESCO Convention as a direct defense and even though the WTO obligations would prevail,

52. GUZMAN & PAUWELYN, *supra* note 17, at 139.

53. *Id.* (citing Joost Pauwelyn, *How to Win a World Trade Organization Dispute based on non-World Trade Organization Law?: Questions of Jurisdiction and Merits*, 37 J. WORLD TRADE 997, 1030 (2003)).

54. *Id.*

55. See Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, ¶ 17, WTO Doc. WT/DS2/AB/R (adopted Apr. 29, 1996); see also Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, ¶ 10-12, WTO Doc. WT/DS8/AB/R (Oct. 4, 1996).

56. See Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 129, WTO Doc. WT/DS58/AB/R (Oct. 12, 1998).

57. *Id.* ¶ 130.

the Convention may serve as a “persuasive authority” type of role, assisting the Panel and/or the Appellate Body in interpreting the meaning of “national treasures of artistic value” under Article XX(f) of GATT, for example. In essence, to answer the question whether the UNESCO Convention would have any type of legal effect on the WTO dispute settlement process is challenging. The UNESCO Convention so far has not been invoked as a direct defense in WTO disputes.⁵⁸

B. Examples of different approaches to protecting the cultural exception

The increase in bilateral and multilateral agreements may be an indication that the concerns regarding the UNESCO Convention being “toothless” are in fact valid. In the following section, this study examines both a Customs Union and a Free Trade Agreement: The European Union and CUSFTA. The question remains whether these types of agreement have more “bite” to attract culturally-conscious states.

1. The European Union

The European Union is a major challenger to the United States in cultural trade negotiations. In cultural matters, the European Union has always been at the forefront of discriminatory protectionism (with France as its main contender). Article 167, Paragraph 4 of the Treaty on the Functioning of the European Union (“TFEU”) explicitly states that: “the Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures.”⁵⁹ Here, “under other provisions of the Treaties” includes trade negotiations, such as the ongoing Doha Round in the WTO.⁶⁰ In addition, the European Union, as a signatory to the UNESCO Convention, is under the obligation to promote cultural diversity. The European Union has stated that protection and promotion of culture is a key policy aim. However, the

58. Would the Panel and Appellate Body in *China – Audiovisuals* have reasoned differently had China invoked its rights under the Convention as a direct defense?

59. Consolidated Version of the Treaty on the Functioning of the European Union art. 167, 2012 O.J. C 326/47, ¶4.

60. *TTIP and Culture*, EUR. COMMISSION (July 16, 2014), http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152670.pdf.

European Union has other important aims, such as the single market and competition regulations. Under Article 101 of the TFEU, the European Union shall prohibit activities that are incompatible with the internal market, which may affect trade between Member States, and “which have as their objective or effect the prevention, restriction, or distortion of competition within the internal market.”⁶¹ Therefore, the European Union may in itself adversely affect (by its economic goals) the non-economic cultural goals of Member States.

In May 2002, the European Commission took notice of a French law prohibiting certain retail groups from advertising on French television.⁶² The French Government argued that the law served a cultural exception purpose: the protection of the local press. A European Commission official remarked that despite the cultural exception, “the single market relies on the freedom to provide services anywhere in the Union.”⁶³ The European Union is moving towards more internal market harmonization, and any exceptions, cultural or otherwise, will become harder to sustain and justify. Although France has succeeded in keeping the audiovisual sector out of TTIP negotiations, former European Commission President José Manuel Barroso has stated, without naming France, that those fearful of a US cultural invasion of Europe “have an anti-cultural agenda.”⁶⁴

Despite the policies for liberalization of the internal market, the European Union still promotes discriminatory measures with regard to culture: both it and its Member States are free to discriminate against foreign providers of audiovisual services. With the quota system introduced by the Television without Borders Directive of 1989, which in 2007 became the Audiovisual Media Services Directive (“AVMSD”), the Member States are able to set quotas to prevent cultural globalization—essentially, and mainly, coming from the United States.⁶⁵

Outside of the European Union, meaning in both bilateral and multilateral negotiations with other states, the European Union has also traditionally excluded the audiovisual sector from any

61. *Supra* note 59, art. 101.

62. See JINGXIA SHI, FREE TRADE AND CULTURAL DIVERSITY IN INTERNATIONAL LAW §7.2.3.1 (2013).

63. *Id.*

64. *Commissioner attacks Barroso’s jibe at French exception*, EU BUS. (June 18, 2013), <http://www.eubusiness.com/news-eu/us-france-trade.p81>.

65. *TTIP and Culture*, *supra* note 60.

commitments. When it comes to this sector, almost none of the European Union's foreign trade agreements allow foreign companies access to its markets or the right to be treated the same as their EU counterparts. How does the European Union fare against the WTO? When the European Union negotiates, it needs to take into account its GATT and GATS obligations. In this framework, the European Union has referred to the concept of "promotion of cultural diversity" since "cultural exception" has no legal status under EU law. However, as seen above, the European Union's standard practice is to exclude the audiovisual sector from any commitments. The European Union also does not negotiate in trade agreements the circumstances in which public subsidies will be granted, in particular for services.⁶⁶ Since subsidies to culture are also excluded from trade agreements, EU Member States, notwithstanding general GATT and GATS obligations, are able to discriminate between foreign and domestic organizations when subsidizing cultural activities.⁶⁷

2. Canada and the United States

Canada, like France, is known for staunchly protecting its cultural products and activities. Its main challenger is its neighbor to the south, the United States. Considering the language barrier is non-existent (save for Québec), the United States sees Canada as a prime export location for its cultural products. According to CUSFTA, cultural industries are in principle exempt from the provisions of the Agreement.⁶⁸ The North American Free Trade Agreement superseded CUSFTA in 1994 to include Mexico. Like its predecessor, NAFTA provides for a similar cultural exception. As this study observes the relationship between Canada and the United States and CUSFTA influenced the creation of NAFTA, the former agreement is preferred for examination. The "cultural exemption" clause serves as a marker for cultural protection in regional settings (though Canada uses the term "exemption" and not "exception"). In fact, France and the European Union, to exclude culture from the GATS negotiations, used the fact that the United States agreed to the cultural exemption

66. *Id.* at 5.

67. *Id.*

68. Canada-U.S. Free Trade Agreement, Can.-U.S., art. 2005, Jan. 2, 1988 [hereinafter CUSFTA].

clause under CUSFTA.⁶⁹ The cultural exemption clause allows Canada to maintain quotas, government subsidies, tax incentives, and other similar measures.

Some argue however, that the cultural exemption measure has not been effective and is undercut by the accompanying provision of the agreement.⁷⁰ Article 2005 does provide that “cultural industries are exempt from the provisions of this Agreement” but it also states that either party could nevertheless “take measures of equivalent commercial effect in response to such actions.”⁷¹ Therefore, the cultural exemption provision is undermined by a retaliatory measure. Canada argues that the retaliatory measure should only be limited to Canadian measures that would violate CUFSTA, which do not extend to audiovisual services. The United States disagrees and argues that the retaliation provision was intended to “serve as a deterrent to the culture exception’s use,” and the United States has looked to this interpretation to retaliate in the audiovisual sector.⁷² This retaliatory method is very much in the spirit of the retaliatory measures in the WTO dispute settlement system. Under the Dispute Settlement Understanding (“DSU”) in the WTO, retaliation is the final, most serious consequence a non-implementing member faces. Article 3.7 of the DSU provides the measure. With that in mind, does the retaliation method under CUFSTA allow for Canada to realistically uphold its cultural exception/exemption? The issue, whether it is in the WTO framework or under CUFSTA, is the same: the cultural exception withstands and cultural sovereignty is protected until the United States decides that it is hindering its market expansion.

CONCLUSION

In studying the concepts of trade and culture in the context of international law, it appears at first that the two are at odds: the cultural exception approach vouches for protectionism and national sovereignty, while trade defends liberalization and globalization. However, within this distinction lies the misconception. Culture does not necessarily reject trade. The word “exception” does. Countries like France and Canada have policies protecting their domestic

69. Ivan Bernier, *Cultural Goods and Services in International Trade Law*, in THE CULTURE/TRADE QUANDARY: CANADA’S POLICY OPTIONS 126 (Dennis Browne ed., 1998).

70. Bruner, *supra* note 43, at 368.

71. CUSFTA, *supra* note 68.

72. Bruner, *supra* note 43, at 368.

cultural industries but they also want them to flourish internationally and regionally. The UNESCO Convention refers to “cultural diversity” which is less restrictive than the term “exception.” An “exception” implies exclusion, whereas “diversity” relates to the notion of cooperation.

The concept of cultural “exception” however does find its legal justification when the adverse party is the United States. The issue is not so much that trade agreements are not suited to deal with culture. The issue is more that the United States is steadily attempting to liberalize trade in the cultural industry and that trade agreements, like the WTO provisions, have an objective and mission to liberalize trade. The WTO considers culture like any other product (textiles, agriculture, etc.) and according to cultural exception proponents, within that analogy lays the dissonance. With that in mind, it would be useful for the WTO to have a separate agreement where cultural goods and services are considered within the legal framework of the organization. The issue is bound to get more confusing with the advancement of technology (e.g. on-demand internet streaming media and the limitless production of artificial intelligence) and the consequences it will have on the goods versus services debate.

In sum, as a result of France’s staunch objection to including the audiovisual sector in TTIP negotiations, the question of whether culture should receive a special treatment within the international trade law framework has been re-introduced. As the Appellate Body has stated with regard to public morals and necessity, it is all about “weighing and balancing.” In the case of cultural products, the WTO negotiating partners should seriously consider weighing and balancing the notions of protection and promotion with regard to the States’ sovereignty, but also the desire of their consumers.